

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE FERRIS,

Defendant-Appellant.

UNPUBLISHED

January 2, 2014

No. 312251

Wayne Circuit Court

LC No. 12-000173-FC

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant David Lee Ferris appeals of right the trial court's sentence for his jury conviction of assault with a dangerous weapon (felonious assault). MCL 750.82. The trial court sentenced David Ferris to serve 32 to 48 months in prison. On appeal, we conclude that the trial court did not err when it concluded that there were substantial and compelling reasons to depart from the mandatory sentencing guidelines and adequately stated the basis underlying its decision to depart to the extent that it did. Accordingly, we affirm.

I. BASIC FACTS

David Ferris' conviction arose from a domestic incident involving his adult son, Elijah Ferris, and his son's girlfriend. At the time, his son and his son's girlfriend were living with David Ferris.

Elijah Ferris testified that, on the day at issue, he awoke to his father pounding on his bedroom door and stating that it was "moving day." Elijah stated that he confronted his father and they fought. Elijah said that both he and his father had training in martial arts. As they fought, David Ferris grabbed a hatchet and threw it "overhand" at Elijah Ferris. Elijah retrieved the hatchet and "ran back to the bedroom and locked the door." His father then began to break down his bedroom door; Elijah Ferris stated that he saw his father breaking the door down and holding a knife and "tire thumper." His father then left and returned with a "Samurai sword", entered the room, and stabbed him in the chest.

David Ferris admitted that he fought with his son on the day in question, but testified that he acted in self defense. He said his son attacked him in a "rage" after he confronted him about some family matters. They struggled and his son put him in what "they call in Judo like a naked strangle." After he broke free, his son grabbed a hatchet and ran to his bedroom. He said he

broke into his son's bedroom to get him to leave and because he heard his son's girlfriend screaming. He did not intend to strike his son with the sword when he went into the bedroom. Instead, his son attacked him with the hatchet: "Then the hatchet's swinging. I'm moving forward. And the hatchet hit the side of the sword and then the sword went into Elijah."

II. SENTENCING DEPARTURE

A trial court must impose a minimum sentence that is within the range provided under the sentencing guidelines. MCL 769.34(2). However, a trial court may order a defendant to serve a minimum sentence outside that range if the trial court has a substantial and compelling reason for the departure and states the reasons for its departure on the record. MCL 769.34(3). This Court reviews a trial court's finding that a particular factor in support of departure exists for clear error. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). This Court reviews de novo whether the factor is objective and verifiable as a question of law. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). And this Court reviews a trial court's determination that a particular objective and verifiable factor constitutes a substantial and compelling reason to depart for an abuse of discretion. *Young*, 276 Mich App at 448. Finally, this Court reviews the trial court's decision to depart to the extent that it did for an abuse of discretion. *Smith*, 482 Mich at 300.

The trial court scored the applicable prior record variables at zero and scored his offense variables at 120, which David Ferris has not contested. Accordingly, under MCL 777.67, the minimum sentence range was from 0 to 17 months in prison. Because the upper limit of the range is 18 months or less, the trial court had to impose an intermediate sanction unless there are substantial and compelling reasons to sentence David Ferris to prison. MCL 769.34(4)(a); *People v Harper*, 479 Mich 599, 617-618; 739 NW2d 523 (2007). An intermediate sanction can include probation, drug treatment, special alternative incarceration, mental health treatment, community corrections placement, a fine, community service, house arrest, electronic monitoring, MCL 769.31(b), or a jail term "that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less." MCL 769.34(4)(a). An intermediate sanction does not include a sentence to serve time in prison. *Harper*, 479 Mich at 618.

At sentencing, the trial court determined that an intermediate sanction would not be appropriate for David Ferris; instead, it decided to sentence him to the maximum possible sentence that it could impose: it ordered him to serve a minimum of 32 months in prison and a maximum of 48 months in prison. See MCL 769.34(2)(b); *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972) (holding that a minimum sentence cannot exceed 2/3 of the maximum sentence that may be imposed under the statute). The trial court explained that David Ferris had a long history of escalating family disagreements to a "point that the police had to get involved." It stated that these police interventions "actually saved people's lives." The court characterized David Ferris' family as being caught in a "cycle of abuse." It also found that David Ferris exploited his son and son's girlfriend's "psychiatric problems" and exploited their vulnerability by accosting them while they were still asleep. The trial court also found it interesting that David Ferris resorted to multiple weapons and told "somebody who is suffering an injury to die and that you hope that they die . . . in such a way as to try to dehumanize the person" These reasons, the court concluded, "give . . . adequate reason to go above the guidelines."

To be substantial and compelling, the reasons for departing must be objective and verifiable, must keenly or irresistibly grab the court's attention, and must be of considerable worth when determining the length of the sentence. *Young*, 276 Mich App at 449-450. A fact is objective and verifiable when it is an action or occurrence external to the minds of those involved in the decision and are capable of being confirmed. *Id.* at 450. The trial court cannot base the departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Here, the trial court relied on the fact that David Ferris had a history of domestic disputes that escalated to violence, took the time to retrieve multiple weapons during the altercation, and exploited his son's and his son's girlfriend's vulnerability during the attack. We agree that David Ferris' history of violence constituted a substantial and compelling factor in support of departure. The prior instances of violence, which did not result in convictions or charges, were clearly characteristics not taken into account under the sentencing guidelines. MCL 769.34(3)(b). These instances of violence were objective and verifiable; they were confirmed in the prosecution's memorandum and in the Presentence Investigation Report, which provided a record of prior offenses. The memorandum included documentation from a prior misdemeanor, prior police reports, and prior acquittals for domestic violence committed against David Ferris' family. This record of domestic violence grabs one's attention and is of considerable worth in deciding the length of sentence. Consequently, this history can support a departure. *Young*, 276 Mich App at 449-450; see also *Smith*, 482 Mich at 301-302.

Similarly, the fact that David Ferris took the time to retrieve multiple weapons during the altercation also constituted a substantial and compelling reason to depart. Although the guidelines included scoring for the use of a weapon, the guidelines do not address the use of multiple weapons or the implications found here—namely that the resort to weapons over time demonstrated his intent to deliberately escalate the violence. See MCL 777.31.

Lastly, the trial court relied on victim exploitation as a substantial and compelling reason to depart. The trial court believed that David Ferris was "aware that his son and the son's girlfriend that were living in the house had past psychiatric problems" and exploited those problems by confronting them early in the morning while they were still sleeping. The Legislature provided for victim exploitation under OV 10, MCL 777.40; but, defendant was scored at zero points for this OV. Thus, this factor could have been adequately addressed under the guidelines and the court failed to state grounds for concluding that it was not adequately considered. See *Young*, 276 Mich App at 450-451 (holding that, as a threshold matter, the trial court must discuss how the factor affected the sentence under the guidelines and explain how that was inadequate). Accordingly, the trial court could not properly rely on this factor in determining whether and to what extent it should depart. *Id.* at 452-453.

Although the trial court relied on one ground that did not constitute a substantial and compelling reason to depart, we are convinced from our reading of the record that the trial court would depart to the same degree. See *People v Babcock*, 469 Mich 247, 260-261; 666 NW2d 231 (2003). Although the trial court accepted the jury's verdict, it clearly found that David Ferris posed a serious threat to his family members, who were caught in the "cycle of abuse."

This cycle, the trial court indicated, necessitated a lengthy minimum sentence. By selecting the maximum minimum sentence permitted under the law, see MCL 769.34(2)(b), the trial court clearly indicated its belief that David Ferris should serve the longest possible sentence permitted for the sentencing offense. This was adequate justification for the particular departure made. See *Smith*, 482 Mich at 303.

III. CONCLUSION

The trial court did not err when it departed from the sentencing guidelines and sentenced David Ferris to serve the maximum minimum sentence permitted by law. Moreover, given our resolution of this issue, we need not address whether David Ferris should be resentenced by a different judge.

There were no errors warranting relief.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly